IN THE

Supreme Court of the United States

October Term, 1956.

No. 56.

PENNSYLVANIA RAILROAD COMPANY and
BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioners,

vs.

N. P. RYCHLIK, Individually and on Behalf of and as Representative of other employees of the Pennsylvania Railroad,
Respondent.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

Questions Presented.

1. Is the decision of a System Board of Adjustment, established under Section 3, Second, of the Railway Labor Act, subject to judicial review, where such Board is comprised of an equal number of representatives from the carrier and from the labor organization charging and prosecuting the cited employees with non-compliance of the Union Shop Agreement, and where the employees' jobs and seniority rights depend on whether such Board finds a rival labor organization of which the cited employees are members to be "national in scope"?

2. Does Section 3, First (f), which provides an administrative procedure for a Railroad labor organization to be determined to be national in scope for the purpose of securing representation on the National Railroad Adjust-

ment Board provide an adequate remedy to an employee and member of a rival labor organization for lack of due process where the same interested labor organization acts as accuser, prosecutor, judge and jury in determining whether an employee has complied with the Union Shop Agreement?

Statement of the Case.

The respondent, and his fellow trainmen, had been in the employ of the Pennsylvania Railroad Co. (hereinafter referred to as Pennsylvania) and at various times were members of the Brotherhood of Railroad Trainmen (hereinafter referred to as BRT) (R. 3; Affid., par. 3, R. 10).

As permitted by the 1951 amendment to the Railway Labor Act (45 U. S. C. A., Section 151 et seq.) Pennsylvania and the BRT, the employees' bargaining representative, entered into a Union Shop Agreement effective April 1, 1952, substantially identical in its terms with the pertient statutory language (Exhibit A attached to the Complaint, R. 12-17). The Agreement, in accordance with the Act, provided that the requirement of membership in the BRT should not be applicable to employees who maintain membership in any one of the labor organizations, "national in scope," organized in accordance with the Act and admitting to membership employees of a craft or class in any of the operating services (R. 13). A System Board of Adjustment was established, composed of two union and two carrier representatives, to decide disputes arising under the Agreement (R. 15-16).

Before respondents dropped their membership in the BRT they were members in the United Railroad Operating Crafts (hereinafter referred to as UROC) (Affid. par. 3, R. 10). The BRT requested the Pennsylvania to terminate the employment of respondent, and his fellow

trainmen employee, for non-compliance (Affid. par. 4, R. 10). After demand, a hearing was held before the System Board of Adjustment to determine their compliance with the Union Shop Agreement. The first hearing was held on August 27, 1953. No decision was reached and on August 23, 1954, a second hearing was held before the System Board of Adjustment (Affid. par. 4; R. 10). By Pennsylvania letter dated January 3, 1955, the respondent, and his fellow trainmen employees, were individually informed that the Board decided that the respondent and his fellow trainmen employees, had not complied with the membership requirements for continued employment as set forth in the Union Shop Agreement, since membership in UROC did not constitute compliance with said Agreement (Exhibit B attached to the complaint, R. 17-18).

Respondent, and his fellow employees, were notified by telephone, on January 14, 1955, that they were no longer in the employ of the Pennsylvania (Affid. par. 8; R. 11). Subsequently, on January 17, 1955, respondent and his fellow trainmen employees, received written notices to the effect that they had been discharged (Exhibit C to the complaint, R. 18; Affid. par. 10, 11; R. 12).

On January 28, 1955, after his discharge, respondent filed a complaint in the United States District Court for the Western District of New York against petitioner, Pennsylvania and BRT intervened. The complaint asked the District Court to restrain the Pennsylvania and BRT from continuing the discharge or suspension of respondent and his fellow trainmen employees until they had been given an opportunity for reinstatement to membership in the BRT under the same terms or conditions available to other members and from enforcing the Union Shop Agreement to terminate their employment (R. 8-9). The complaint alleges, among other things, that the Union Shop

Agreement between the Pennsylvania and the BRT was in conflict with the Railway Labor Act and therefore invalid for the following reasons, among others:

(1). The Union Shop Agreement does not provide for a System Board of Adjustment in Union Shop Agreements to determine complaints initiated by the Union against an employee (R. 7);

(2). Section 3, Second, of the Railway Labor Act authorizes System Boards for the purpose of hearing only disputes between an employee and carrier and not disputes between bargaining representatives and the employees (R. 7);

(3). The Agreement permits the representative of the BRT to sit in judgment on the BRT's complaint against the employees (R. 8);

(4). The Agreement attempts to make the decision of the Board final without any right to appeal or review (R. 8).

The District Court, on petitioners' motions, dismissed the complaint for failure to state a cause of action (R. 34-36). The District Court held that it had jurisdiction to review decisions of a System Board of Adjustment, but that judicial inquiry is at an end once it is determined (1) that the Board's procedure and the award conforms substantially to the Statute and Agreement; (2) that the award confines itself to the letter of submission; (3) that the award was not arrived at by fraud or corruption (R. 29). The District Court further held that the fact the Agreement between the BRT and the Pennsylvania provides for a System Board consisting of two representatives of the Railroad and two from the Union does not, *per se*, make such an agreement invalid (R. 30).

The Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded the case for trial on the merits (229 F. 2d 171; R. 39-44). The Court held that the System Board of Adjustment had jurisdiction over the matter because it was a dispute between the carrier and its employees (R. 41). The Court also unanimously held that the presence of the BRT labor members on the Board required that there be impartial review of the decision and since there was no administrative board which could provide this, there must be judicial review (R. 43). The Court further held that Section 3, First (f) was not an adequate alternative remedy because such procedure might not necessarily determine whether UROC was "national in scope," and that, in any event, it was not available to the employee, but only to UROC (R. 43).

Summary of Argument.

1. Judicial review from the decision of the System Board is required because two of its four members were officers of the petitioner union which instituted and prosecuted the charges against the respondent employees. The opposing briefs contend that, despite this, there should not be judicial review in this case.

a. The contention of the Pennsylvania that because of the alleged general immunity of Railway Labor disputes from Court surveillance, the System Board must be presumed to be unbiased is untenable when, on the contrary, it is obviously biased and because under it due process requirements would have no application in the railway labor field. This Court has frequently held, and as the Court below stated, the requirement of a fair and impartial hearing transcends the general immunity of railway labor disputes from judicial review.

b. The BRT contention that Congress exhibited a "trust" in the men serving on railway labor boards is also without merit because the interest to perpetuate their own organization permeates the decision these men are in a position to render.

2. The decision of the Court below does not make review of System Board action inevitable. Only where the union "agressively" prosecutes its claims against nonmembers and has a vital interest in the outcome is the decision subject to court review. Under this situation, remand cannot be made to any board because the Union Shop Agreement requires two union members to be on such board.

3. Section 3, First (f) does not apply. The Union Shop Amendment by its express erms confers on the employee the right to retain his job if he belongs to an alternative union national in scope. Section 3, First (f) provides a procedure whereby a union can place a representative on the Adjustment Board. By the plain meaning of the statute and from the Congressional debate Congress did not intend to incorporate the technical provisions of Section 3, First (f) into the Union Shop Amendment.

a. To be adequate a remedy must obviously be available and necessarily determine the issue. The Court below correctly held that Section 3, First (f) fulfills neither requirement.

b. To refute the unanimous holding of the Court below, the opposition argues that the right to determine "national in scope" status under the exception to the Union Shop requirement, is granted by Congress exclusively to the competing union; that the exclusive way a union can establish its status for union shop purposes is to qualify under Section 3, First (f), and that, therefore, any bias

of the System Board was immaterial because it had no discretion to arrive at an independent conclusion. All this is read into the Act without authority, and contrary to established law.

(1). The law is established that in "minor disputes," as the one involved herein, rights granted by Section 2 of the Railway Labor Act are conferred on the employee and not on his union.

(2). Section 3, First (f) is limited to the union's placing a representative on the Adjustment Board, and is not, as contended, the exclusive manner in which "national in scope" status can be obtained. For example, Railroad Retirement regulations, rebutting this contention of the opposition, have been part of the public record since 1937, and Congress must be presumed to have knowledge of them.

(3). Therefore, there was discretion in the System Bo. d to act and judicial review is necessary.

c. Even assuming the opposing contentions, judicial review is, nevertheless, necessary. Before Section 3, First (f) can be invoked, the participating unions must certify a dispute. They have avoided this prerequisite certification in the past, and are currently avoiding this as to UROC. Thus, because of such evasion, the Section cannot be a cure for due process deficiencies at the System Board level, for the application of the Section is also within the control of the "standard unions."

4. The opposition support their contentions by claiming judicial review will bring, in effect, chaos and confusion in the industry. They overlook that the Court below found judicial review necessary because petitioners failed to set up an impartial board to administer their Union Shop Agreement. They further disregard that if this Court

adopts their arguments the "standard unions" will be so entrenched as to prevent new, competing organizations. Congress certainly never intended this result in passing the Union Shop Amendment. Congress is presumed to have adopted the prior definition of "national in scope" of the Secretary of Labor. This definition, in substance, is that to be "national in scope," a union must represent employees of different companies rather than be organized within a single company or carrier, and have more or less general dissemination throughout the country shown by such criteria as geographical area of representation, number of employees represented, number of agreements, number of carriers with whom agreements are held, and mileage of such carriers. With this definite guide for court review, chaos and confusion cannot arise.

I.

The award of the System Board of Adjustment is in violation of due process and reviewable by a Court because the Board could not and did not give the respondent, and his fellow employees, a fair and impartial hearing.

The BRT cited the respondents for non-compliance with the Union Shop Agreement. At the hearing before the System Board, the BRT prosecuted the charge. Two officials of the BRT sat on the four-man System Board which sustained the BRT charge of non-compliance, and held that the competing union, UROC, to which respondents belonged, was not "national in scope."

The Court below unanimously condemned this procedure as completely defeating the most elementary requirements of fair play. Nothing, said the Court below,

would more firmly entrench the recognized unions in power.[1] Even the Sixth Circuit in *Pigott, et al., v. Detroit T.I.R.R. Co.* 221 F. 2d 36, affirming 116 F. Supp. 949, recognized that this procedure was inherently unfair. Thus the District Court's opinion, approved by a divided Court, which was unanimous on this point, stated:

> "Because of the conflict of interests between the established unions and a 'new' union, the National Railroad Adjustment Board is not a competent agency to review the qualifications of such a labor organization. With half of its members selected by the established unions, it is not likely that they would regard with equanimity the claim of a 'new' union, a rival to one or more of the members' organizations. This pressure to protect a vested interest would be even greater were the matter to be heard by a system board of the type before which the plaintiffs appeared in the instant case. That board, as has been stated, was made up of one representative of the Railroad and one representative of the Brotherhood" (p. 954).

Both Courts are thus agreed that the procedure is unfair. The disagreement between the two Courts of Appeals is whether Section 3, First (f), is an adequate alternative remedy for this.[2]

Despite the wide application of this basic principle to

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[1] R. 43.

[2] The District Court's interpretation of Section 3, First (f) which is adopted by the three *amici curiae* briefs will be discussed, *infra*.

administrative boards as well as to courts,[3] the petitioners contend it does not apply in the Railroad labor field whether or not Section 3, First (f), is involved in the case.

To circumvent this principle of law, so firmly established that Judge Hand did not cite case law for it, the Pennsylvania contends that it should be ignored and there should not be judicial review of the decision of the System Board of Adjustment (pp. 10-37). It urges the somewhat remarkable conclusion that the Board must be presumed to be unbiased, even though on the contrary, bias is obvious. Thus, Pennsylvania somewhat strangely contends that the public interest in the impartial protection of rights granted by an Act of Congress is transcended by the supposed general immunity of railway labor disputes from all surveillance or review by a Court of law. We agree that the cases cited by the Pennsylvania stand for the proposition that *normally* Courts will not review decisions of System Boards on the merits. But, here

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[3] *Tumey v. Ohio*, 273 U. S. 510, 522 (applied the principle to hold unconstitutional an Ohio Statute which provided that an inferior court judge was to be paid for his services only after conviction); *People v. Naimark*, 154 App. Div. 760, 763, 130 N. Y. S. 418, 420 (new trial granted because remarks of judge in passing sentence showed he had prejudged the case). Orders of the National Labor Relations Board have been vacated in the following cases because of partiality. *NLRB v. Ford Motor Co.*, 114 F. 2d 905, 909 (C. A. 6); *Inland Steel Co. v. NLRB*, 109 F. 2d 9, 20; *NLRB v. Phelps*, 136 F. 2d 562, 563 (C. A. 5) (collates past decisions in Footnote 1, page 563 and holds that if anything, this principle is more essential in administrative decisions). *Texas Electric Service Co. v. City of Seymour*, 54 F. 2d 97, 98 (D. C. Tex.) applied the principle to avoid a minimum rate set by a city council to encourage consumers to use the municipal plant. This Court recently held that it was a violation of due process for a judge to try a witness for contempt committed before him when acting as a one-man grand jury. This Court stated: *In Re Murchison*, 349 U. S. 133: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in a trial of cases. But our system of law has always endeavored to prevent the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome" (p. 136).

we do not have the normal situation where both parties are equally represented on a bipartisan board. Here we have the exception, where only one of the parties is so represented, and, therefore, judicial review is essential to protect the rights of the other party.

Edwards v. Capital Airlines, Inc. (C. A. D. C.), 176 F. 2d 754, cert. den. 338 U. S. 885 (1949), followed by the Court below in reaching its decision, reviewed the decision of the System Board on the merits in a similar situation.

Farris v. Alaska Airlines, Inc., 113 F. Supp. 907 (D. C. Wash., 1953), cited by Pennsylvania (p. 15) in support of its contention of no review, carefully distinguished the *Edwards* case, *supra*. Thus the Court stated in footnote "6" to its opinion:

> "In *Edwards v. Capital Airlines*, 1949, 84 U. S. App. D. C. 346, 176 F. 2d 755, the court reviewed the award of a System Board of Adjustment *on the merits*. In that case, however, plaintiff was a co-pilot who brought his grievance before a board, the labor members of which were pilots and members of a union which opposed plaintiff's claim. The court made it clear that it subjected the award to such broad review precisely because plaintiff was not properly represented before the board" (p. 909). (Italics supplied.)

In *Bower v. Eastern Airlines, Inc.*, 214 F. 2d 623 (C. A. 3), cert. den. 348 U. S. 871 (1954), where plaintiff sued for damages for wrongful discharge after a claim for reinstatement had been denied by the System Board of Adjustment established under Section 204, Title II, of the Railway Labor Act,[4] the Court specifically reviewed the question whether the Board gave plaintiff a full and

[4] Title II deals with airlines and is summarized in Pennsylvania brief page 15.

fair hearing and exercised honest judgment in reaching a decision on the full record. There the Court found that it did. Here the Court below correctly held it could not because of its composition.

Pennsylvania attempts to distinguish the *Edwards* case, *supra,* on two grounds. First, it claims that the Court was probably influenced by the fact that the dispute involved the seniority rights of veterans returning from military service. That is erroneous. The Court in summarizing its position uses language appropriate to the instant case and emphasizes the right to judicial review on the merits from the System Board decision:

> "The situation can be summarized in simple terms. All employees of a company have rights under a contract. A dispute arises between a few employees and a great majority of employees concerning the rights of the few. The claims of the few are adverse to the interests of the majority. The company has no actual concern in the controversy one way or the other. The dispute goes for decision to a tribunal composed of two representatives of the company and two representatives of the union of the employees. The union assumes representation of the claims of the majority. The contract provides that the decision of this tribunal shall be final and binding. It also happens that the few employees are non-members of the union. The question is: Can the 'final and binding' clause of the contract prevent the few employees (non-members of the union) from securing a judicial review of an adverse award made under this combination of circumstances? We must conclude and we do, that it cannot. These appellants, in our view, had standing to bring these actions and the court was required by their complaint to examine the validity of the award against them. Persons in their situation must have available to them, at some point, an impartial look at a decision, thus made, denying their

> claims to substantial rights. This is the time-honored function of an equity court'' (p. 761).

Second, Pennsylvania points out (p. 20) that the decision in the *Edwards* case, *supra,* preceded this Court's decision in *Slocum v. D. L. W. R. R. Co.,* 339 U. S. 239 (1950). The *Slocum* case, *supra,* specifically excluded a case like the one at bar from the basic assumption which Pennsylvania advances. This Court stated in footnote 7:

> "We are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative, as in *Steele v. Louisville & N. R. Co.,* 323 U. S. 192, 89 L. ed. 173, 65 S. Ct. 226. Nor are we called upon to decide any question concerning judicial proceedings to review board action or inaction'' (p. 244).

Mr. Justice Reed, of this Court, commented on this footnote in his dissent at pages 245-246:

> "The Court, however, in note 7 states that it is not 'called upon to decide any question concerning judicial proceedings to review board action or inaction.' From this I take it that the Court means only to hold the Board has what might be called exclusive primary jurisdiction and that the decision is to have no implications for later cases which might pose the issue of judicial review of Board 'action or inaction.'''

Thus, Pennsylvania's reliance on the *Slocum* case, *supra,* throughout the first sections of its brief to support the argument that Railway Labor disputes are beyond the jurisdiction of the Courts except in enforcement proceedings is without substance. The Court in the *Farris* case, *supra,* decided after the *Slocum* case, *supra,* had no difficulty in recognizing the distinction drawn in the *Edwards* case, *supra,* expressed in the above quoted footnote from that Court's opinion.

The BRT brief (pp. 16-18) uses a different argument for the conclusion that the three learned Judges below were in error in unanimously holding reviewable the decision of the System Board of Adjustment because of the obvious bias of the labor members sitting on the Board. It argues that Congress apparently had sufficient faith in the honesty, integrity and objectivity of union official representatives called to serve in a dual capacity on these Boards, to sanction their acting also as Board members and to fortify their decisions with final and binding effect. The BRT argues from this, that Courts should not lightly overrule this "trust" that Congress has thus exhibited. Considering BRT's contention that Congress intended that the System Board have jurisdiction over disputes like that in the present case, this is fully answered by *Texas Electric Service Co. v. City of Seymour*, 54 F. 2d 24, where the Court said:[5]

> "Those who compose the Seymour city council were unquestionably men of integrity, *but they were men*" (p. 96). (Italics supplied.)

The decision of the Court below is not at "war" with the whole pattern of the Railway Labor Act as alleged in the Brotherhood brief. On the contrary, the arguments advanced by the petitioners that the presence of the labor members on the System Board whose union instigated and prosecuted the charges against the respondents did not, *per se*, make the awards invalid, if not reviewable, by some tribunal or it is at "war" with the basic proposition of American jurisprudence recognized by both the Court below and the Court in the *Pigott* case.

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[5] The facts of this case are summarized in footnote 3, *supra*.

II.

The decision of the Court below does not make inevitable court review of System Board decisions.

Both petitioners seek to broaden the decision of the Court below by claiming that its logical result is to make judicial review available to any employee who loses before a System Board solely because labor representatives sit on the Board and participate in the decision. This contention disregards the distinction expressed in the *Farris* case, *supra*. The Court below correctly held there must be review from the decision of such a Board where half of it is composed of members of the same union which cited and prosecuted the charges against the employee, and where the same half of the Board belonged to the very organization which is most vitally interested in having a rival organization declared not to be "national in scope."

The Court below could not limit its decision to setting aside the Board's award and remanding the dispute for further disposition under the procedure of the Railway Labor Act, as suggested on page 21 of Pennsylvania's brief, for the very simple reason that the only Board to hear the dispute further would be a Board similarly constituted and biased. This vital fact distinguishes the present case and the *Edwards* case, *supra*, from the *Farris* and *Bower* cases, *supra*, and the other cases cited in Pennsylvania's brief (pp. 15-16). In other words, as the BRT brief describes it (p. 13), where the union "aggressively" presses its claims against nonmembers, there must be review on the merits by a Court because there is no Board validly established by the carrier and union under the provisions of the Railway Labor Act which can give the nonmembers a fair and impartial hearing.

Because of this self-interest, respondent urged before the lower Court that Congress never intended that System Boards have jurisdiction in these disputes. Section 3, Second of the Act, Title 45 U. S. C. A., Section 153, Second, is the authority for the establishment of System Boards of Adjustment, whose jurisdiction is limited to the same type of disputes which the National Railroad Adjustment Board is empowered to hear.

Therefore, to determine the jurisdiction of the System Boards of Adjustment, the jurisdiction of the National Railroad Adjustment Board must first be examined. Section 3, First of the Act, 45 U. S. C., confers on the National Railroad Adjustment Board jurisdiction only over disputes between carriers and their employees.

Who are the disputants? For the sake of expediency Pennsylvania contended before the lower Court that the dispute was between it and its employees in order to sustain the jurisdiction of the System Board to act in the first instance. But, who is the real party in interest? Who stands to gain or lose by the decision? Who initiated and prosecuted these charges? Certainly, it is not the Pennsylvania, but the BRT. *Hargrove v. Brotherhood of Locomotive Engineers,* 116 F. Supp. 3, confirms that the mere fact that the Pennsylvania fired these men does not make it the real party in interest. In that case, plaintiff had been employed in the operation of the Government-owned railroad on the Oak Ridge Reservation, which was subsequently taken over by the Louisville and Nashville Railroad. The bargaining agreement negotiated by the Brotherhood and the Railroad cancelled or ignored certain seniority rights of the plaintiffs, and as a result they were discharged. The Court stated:

> "Looking first to its language (Railway Labor Act), it will be noted that it (Administrative Board

> created under the Railway Labor Act) is confined to 'disputes between * * * employees and a carrier.' This dispute in its present posture is not one between employees and a carrier, but between members of labor unions and their unions" (p. 6).

Under the above, the award of the System Board is invalid and of no effect since a System Board could not be established to hear the instant dispute between the employees and their bargaining representative.

The Court below rejected this proposition and held the dispute was between the carrier and its employees.[6]

Since the Court below held that the System Board had primary jurisdiction, then, unless the Act is to be declared unconstitutional there must be impartial or judicial review. As previously pointed out, there cannot be a remand to some Board created by the parties under the Act since no impartial Board is possible under the present bargaining agreements. Therefore, unless the Act itself furnishes an "adequate remedy" there must be Court review.[7]

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[6] Contrary to the assertion on page 23 of Pennsylvania's brief, the Court below did not reject previous so-called UROC cases, cited on page 22 of the Pennsylvania brief, with the exception of the *Pigott* case, *supra*, in reaching its decision. All that these cases held was that the System Board had "primary jurisdiction" of such disputes. That these Courts did not intend to foreclose judicial review on the merits after the System Board had acted is clearly shown from the following illustrative quote from *Johns v. Baltimore and Ohio R. Co.*, 118 F. Supp. 317, at 321, aff'd *per curiam* 347 U. S. 964, where the three-judge Court said the dispute was: "* * * cognizable by the Board, and that should put an end to the jurisdiction of this court *until plaintiff has there sought his remedy.*" (Italics supplied.)

[7] The above applies to the contentions advanced by the petitioners. The position adopted by the three *amici curiae* briefs will be discussed *infra*. Point III. See comment, 18 University of Chicago Law Review 303 (1950), for an informative discussion on the manner in which representatives on the National Railroad Adjustment Board are motivated by partisanship.

III.

Section 3, first (f), is not an adequate remedy for the obvious bias of the System Board or the exclusive manner in which "national in scope" status may be obtained.

The BRT brief argues in the alternative that either the procedure under Section 3, First (f) is an adequate remedy for any bias of the System Board, or that it is the exclusive method for determining "national in scope" status so that any bias is immaterial.[8] The striking fact about these alternative arguments is that they are mutually exclusive. In other words, the argument that this Section is an adequate remedy for bias of the System Board is based on the assumption that the System Board has discretion to act.[9] The alternative contention, on its face, denies that there is discretion in the System Board, and is based on the premise that Section 3, First (f) is the exclusive manner in which "national in scope" status can be defined.

Section 3 of the Act (App. A., p. 3a) is entitled "National Railroad Adjustment Board * * * Establishment; composition; powers and duties; divisions; hearings and awards." It appropriately deals with the typical questions involved in the establishment, composition

[8] The Pennsylvania brief relies mainly on the first of these alternative arguments, while the Government brief dedicates itself exclusively to the second.

[9] As will be shown, *infra*, this is the view that, with the possible exception of the District Court in the *Pigott* case, *supra*, has been generally adopted in this field of law.

and jurisdiction of the National Railroad Adjustment Board.

Subdivision (a) of Section 3, First (App. A., p. 3a) provides that one-half of the members of the National Railroad Adjustment Board shall be selected by "such labor organizations of the employees, national in scope, as have been *or may be organized* in accordance with the provisions of Section 2 of this Act."[10]

Section 3, First (f) (App. A., p. 4a) provides that if a dispute exists as to the right of any national labor organization to participate in the selection of members of the Adjustment Board, then the Secretary of Labor shall first investigate the claim, and, if he decides it "has merit" he shall notify the Mediation Board. That Board will then ask those unions already qualified as electors to select one of their members to serve upon a three-man Board, the applicant itself will select another member and the Mediation Board will select a third or so-called neutral member to pass upon the dispute.

Thus, Section 3, First (f) provides a three-step procedure for a "new" union to become qualified to participate in the selection of labor members to the Adjustment Board. First, such new union must obtain a certification that a "dispute" exists between it and the qualified organizations; second, the Secretary of Labor must investigate the "new" union's claim for a seat on the Adjustment Board and decide if it has merit; and third, if the Secretary of Labor finds that a dispute exists and there is "merit" to its claim, the three-man Board is chosen to

[10] As the above emphasized language shows it is clear that Congress contemplated new unions may become qualified to participate in the selection of Adjustment Board members. As will be shown, *infra*, the interpretation of Section 3 advanced by all the opposing briefs, makes this a practical impossibility.

pass on the application.[11] The Court below and the Court of Appeals in the *Pigott* case, *supra*, are agreed that if the above procedure of Section 3, First (f) fails to provide an adequate remedy for the bias of the System Board or remove discretion from the System Board to arrive at a decision of its own on the merits, then the determination of the System Board must be invalid.[12]

A.

Section 3, First (f), is not an adequate remedy for the violation of due process inherent in the composition of the System Board.

The first argument of the petitioners is that Section 3 is an adequate remedy for any bias of the System Board. The Court below held it was not. It is obvious that before a remedy can be examined to see if it is adequate two things must first be determined. First, is it available? Second, will it necessarily determine the issue? The Court below decided in the negative on both of these preliminary determinations.

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[11] U. S. Dept. of Labor, Decisions of the Secretary, in the *Matter of United Transport Service Employees of America* (Jan. 2, 1947); *Brotherhood of Sleeping Car Porters* (Sept. 8, 1948); *American Railway Supervisors Association, Inc.* (Sept. 8, 1953) (all set forth in appendices pp. 10a-33a). These decisions show that the procedure is in fact a three-step procedure, and not a two-step procedure as outlined in all opposition briefs in that, the Secretary of Labor must certify a dispute before he can act further.

[12] See the quoted portion from District Court's opinion in the *Pigott* case, *supra*, p. 11. The Government brief also tacitly adopts this view on page 7 where it states: "If it is assumed that such a 'right' exists, the only issue is whether the administrative procedures of Section 3 provide an employee with a proper tribunal for determining if his alternative union, in fact, meets these requirements."

First, the Court said that the remedy was not adequate because it did not necessarily determine the issue.[13] Section 3, First (a) of the Railway Labor Act provides that one-half of the members of the National Railroad Adjustment Board shall be selected "by such labor organizations of the employees, *national in scope,* as have been or *may be* organized in accordance with the provisions of Section 2 of this Act." (Italics supplied.) Section 3, First (f) provides that the Board of three shall decide whether the union "was organized in accordance with section 2 hereof and is *otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board.*" (Italics supplied.) All five opposing briefs argue that the phrase "otherwise properly qualified to participate in the selection of labor members of the Adjustment Board" in Section 3, First (f) is equal in meaning to the words "national in scope" used in Section 3, First (a).

The obvious answer to this interpretation is: why did Congress use the expanded phraseology instead of simply repeating the words "national in scope"? Reading Section 3 as a whole provides the answer. Section 3 requires that the Secretary of Labor first pass on the merits of the claim. In doing so the Secretary must make a determination on the merits of the "national in scope" status.[14] The Secretary has defined the phrase by refer-

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[13] Justice Hand in reaching this conclusion stated: "* * * when a union applies to be chosen as an elector there are other conditions that it must satisfy besides being 'national in scope': i. e., it must be 'organized in accordance with' the Act, and it must be 'otherwise properly qualified to participate in the selection of the labor members' of the National Board (Sec. 153, First [f]). The 'board of three' may of course make a specific finding that the applicant union is not 'national in scope,' as the ground of refusing to admit it as an elector; but if it fails to do so, it will be impossible to know whether this was in fact its ground for refusal; and a proceeding that may leave this issue undecided can hardly be intended as a remedy for any bias of the 'System Board'" (R. 42-43).

[14] See footnote 11, *supra.*

ring to its legislative history which shows that the term was used to "differentiate between the union organized within a single company or carrier and those representing employees of different companies."[15] He added other criteria such as the geographical area in which the claimant's representation extends, the number of employees represented, the number of agreements, the number of carriers with whom agreements are held, and the mileage of such carriers (p. 11 of the Secretary's decision, quoted in note 11, *supra*). The Secretary referred to these other criteria because they were "relevant by virtue of the plain and unambiguous language of the Statute" (p. 11, *supra*). The Secretary, in making his definition, followed the decision in *National Labor Relations Board v. Highland Park Mfg. Co.*, 341 U. S. 322, where this Court stated concerning the term "national or international labor organization":

> "If Congress intended geographic adjectives to have a structural connotation or to have other than their ordinarily accepted meaning, it would and should have given them a special meaning by definition" (p. 324).[16]

Why then with the Secretary of Labor known to be so intensively investigating the issue of "national in scope"

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[15] U. S. Dept. of Labor, Decisions of the Secretary in the *Matter of the American Railway Supervisors Association, Inc.* (Sept. 8, 1953) (set forth in App. D, p. 22a). Page 9, Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73rd Congress, 2nd Session (1934), p. 19156.

[16] The Secretary of Labor's inclusion of these other criteria in the determination of "national in scope" also appears to be justified by the following colloquy, at the time the 1934 Amendments were under consideration, at pp. 12-13 of the Hearings before the Committee on Rules, House of Representatives, 73rd Cong., 2d Ses. on H.R. 9861 (1934): "Mr. O'Connor: They could not be national in scope if they were members of a union made up of employees of some little railroad entirely in one State. Where would the national in scope come in?" "Mr. Crosser (Congressman from Ohio and sponsor of the bill): I say, if they did not have more or less of a general dissemination of their membership throughout the country, they would not be national." (Italics and bracketed material supplied.)

did Congress set up the "three-man Board"? The answer is in the expanded statutory language "otherwise properly qualified to participate in the selection of labor members of the Adjustment Board * * *." In other words, Congress must have concluded that while an organization might be "national in scope": i. e., might not be a company union and might be "more or less widely disseminated throughout the country," it might not have sufficient stature to be "otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board * * *." Thus, the Court below correctly held that "* * * a proceeding that leaves this issue (national in scope) undecided can hardly be intended as a remedy for any bias of the 'System Board'" (parenthetical material supplied). The Court's interpretation is directly in line with the many decisions of this Court holding that where the words of a statute are plain, the Court is not at liberty to add additional and qualifying terms.[17] What petitioners are seeking to do is aptly described by Mr. Justice Frankfurter of this Court in *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, when he stated in discussing the term "assumption of risk":

> "A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes[18] contradictory ideas" (p. 68).

The second reason given by the Court below for its holding that Section 3, First (f) was not an adequate remedy for the bias of the Board was that the remedy was not available to the employee but only to his labor

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[17] e. g., *Osaka Shosen Line v. United States*, 300 U. S. 98, 101.

[18] The Pennsylvania brief quotes the phrase "otherwise properly qualified" as "likewise properly qualified" in the Appendix to its brief (p. 53) and in the petition for the writ (p. 23a). Were this typographical error the correct language of the statute, the petitioner's contention might have more merit.

union, over which he, as an individual, had no control. The Court further reasoned that even if the employee could force the union to exhaust the remedy, there was no reason why he must be compeled to accept the union as the surrogate of his rights.[19] The lower Court's holding that the statutory rights belong to the employee is indeed unanswerable without doing violence to established principles pertaining to exhaustion of remedies. In rebuttal, petitioners are forced to argue that the individual employee is given no right to avoid his union shop membership requirements by belonging to an alternative union, and that the right created in subsection (c) is conferred exclusively on the qualified operating union itself.[20] To reach this conclusion, petitioners do violence to the express language of the statute, previous decisions of this and other Courts, including the opinion of the Court of Appeals in the *Pigott* case, *supra*, and change their own previously expressed position.

The Brotherhoods, the Railway Executives Association, and the Government argue in substance as follows:

1. The individual employee is given no right by this Statute to continue working if he belongs to a competing organization in fact "national in scope."

2. The exception contained in Section 2 Eleventh (c) (the "national in scope" exception to the Union Shop requirement) is a "right" conferred exclusively on the so-called qualified operating unions themselves.

3. Whatever the status of a competing union may be in fact, it is not "national in scope" as a matter of law un-

[19] Record, p. 43.

[20] The three *amici curiae* briefs concern themselves only with this question, and on this ground come to an opposite conclusion than that reached by the Court below. The Pennsylvania brief, on the other hand, does not interpret the statute in this manner.

less and until it has qualified under Section 3, First (f) and participates in the selection of Adjustment Board members.

4. Therefore, there is no discretion in the System Board thus disposing of questions of remedy and jurisdiction.

If any one of the first three points is not well taken, the concluding point "4" in this syllogism falls with the entire argument. This argument goes in a circle for either all these contentions stand or all fall together. If the right is in the employee the issue becomes the adequacy of Section 3, First (f).[21] If the right is not conferred on the so-called qualified operating unions, then Section 3 does not apply because it is something that only the union can accomplish and over which the employee has no control. If Section 3, First (f) is not the exclusive way in which a union can be determined to be "national in scope" then there is discretion in the System Board. Finally, if there is discretion in the System Board, the question of bias is squarely presented again.

B.

The rights are conferred on the employee individually and not upon his bargaining representative.

Section 2, Eleventh (c) confers on the employee the right to keep his job if he belongs to a competing union "national in scope." This section states:

> "The requirement of membership in a labor organization in an agreement made pursuant to subparagraphs (a) of this paragraph shall be satisfied, as to (operating employees) * * * *if said employee* shall hold or acquire membership in any

[21] P. 7 of the Government brief.

> one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services * * *." (Italics supplied.)

Thus, the Statute, by express terms, confers this right upon the employee, and not upon his labor organization. The Government calls the above language "expanded" and concedes (p. 8):

> "If subsection (c) stated simply that the requirement of membership shall be satisfied by membership in 'any other labor organization national in scope,' the plain meaning of such language might require the interpretation placed on it by the Court below."

But if Congress intended to incorporate the highly technical provisions of Section 3 into Section 2, which this Court has held grants individual rights to the employees and not to their bargaining representatives, *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, why did not Congress simply say that the requirement of membership shall be satisfied by membership in "any labor organization qualified under Section 3, First (f)."[22] Congress, did not do so, although in passing the Union Shop Amendment, it took pains to amend Section 2, Fourth, and Section 2, Fifth, of the Act in order to make them consistent with the Union Shop provisions of Section 2, Eleventh, and specifically referred to subsection 3 First (h). (App. A., p. 5a.) As Judge Allen stated in the dissenting opinion in the *Pigott* case, *supra*:

> "To apply the technical administrative provisions of Section 153, First, relating to unions and management, to the simple but all important guar-

[22] Serious constitutional questions would arise if Congress had used this language in view of the fact that minority rights would be unprotected since the qualified organizations must certify a "dispute" to the Secretary of Labor.

> anties of Section 152, Eleventh, on behalf of the employee, nullifies the Congressional intent and constitutes judicial legislation.
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> "The question here is not how the National Railroad Adjustment Board shall be constituted nor whether the appellee union shall have a representative on the National Railroad Adjustment Board which is the general subject of Section 153, First. The question here is whether appellants shall be deprived of their livelihood. Their right not to be deprived of it if U.R.O.C. comes within the classification of Section 152, Eleventh (c) is a valid statutory right falling within the general jurisdiction of the federal court under title 28, Section 1331. The case certainly arises under a law of the United States. It is a right which should be protected by the examination of a court free from bias or conflict in interest and safeguarded by judicial procedure" (p. 743).

There is a simpler explanation for the "expanded language." Through the use of this language, Congress intended to incorporate the previous definition of the Secretary of Labor into Section 2, Eleventh (c).[23] The language used in Section 2, Eleventh (c), as the opposition briefs point out, is the same as the language used in Section 3, First (a) which was specifically construed by the Secretary of Labor. Thus, in accordance with recognized canons of construction, Congress must have intended to adopt the definition and construction of the Secretary of Labor.[24] This is especially confirmed because Congress made no other definition of its own. Further, this interpretation is consistent with Congressional use of "other-

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[23] Two of the decisions of the Secretary were made before Section 2, Eleventh (c) was added to the Act. See footnote 6, *supra*.

[24] *I. C. C. v. Parker*, 326 U. S. 60 cf. *Copper Queen and Consol. Mining Co. v. Territorial Board of Equalization of Arizona*, 206 U. S. 474; *Greenleaf v. Goodrich*, 101 U. S. 278; *National Lead Co. v. United States*, 252 U. S. 140; *U. S. Dakota-Montana Oil Co.*, 288 U. S. 454.

wise properly qualified," in Section 3, First (f). This language, which the opposing briefs strive so hard to equate with "national in scope," used in Section 3, First (a), refers only to the three-man Board determination and not to the Secretary of Labor. Thus, Congress did not intend to incorporate technical provisions of Section 3, First (f) into Section 2; but rather, to incorporate the definition of the Secretary of Labor, of which Congress is presumed to have knowledge and advice.[25] In addition this interpretation gives full meaning to the word "national" used in the beginning of Section 3 First (f). The section starts:

> "In the event a dispute arises as to the right of any national labor organization to participate * * *"

In other words, in order to invoke the procedure under Section 3 First (f) an organization must be a "national" one, and the Secretary of Labor determines whether it is national and whether there is merit to its claim to participate.

Significantly, none of the other briefs join in the Government's argument of "expanded language." Instead, their arguments are addressed mainly to the assumption that Congress must have intended that the employees should have no individual rights because of the supposed

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[25] In 1 *Sutherland on Statutory Construction*, 3rd edition, Section 1933, pp. 428-429 (1943), it is said: "* * * the legislature is presumed to know the prior construction of the original act, and if words or provisions in the act or section amended that had been previously construed are repeated in the amendment, it is held that the legislature adopted the prior construction of the word or provision." See also Section 1935, pp. 432-433 (cited on p. 26 of the B. L. E.).

And in Vol. 2, Section 5109 pp. 423-524 it is said: "Where a statute has received a contemporaneous and practical interpretation and the statute as interpreted is re-enacted, the practical interpretation is accorded greater weight than it ordinarily receives, and is regarded as presumptively the correct interpretation of the law. The rule here is based upon the theory that the legislature is acquainted with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing the law, and therefore impliedly adopts the interpretation upon re-enactment."

consequences flowing therefrom.[26] But, even assuming, without conceding, that the qualified organizations are correct in what they deem to be the dire consequences of the lower Court's decision, this very argument was rejected by this Court in the *Elgin* case,[27] *supra*, on the theory that individual rights were more significant.[28] The Court below came to the same conclusion in the present case (R. 44).

The *Elgin* case, *supra*, involved the question whether the individual employee had the right to settle his own grievances, or whether the collective bargaining agent had exclusive authority to settle them. This Court drew a sharp distinction between "major disputes" and "minor disputes" under the Railway Labor Act. In the case of "major disputes": i. e., those involving major issues, such as certification of bargaining representatives, upon which strikes ordinarily arise and where the National Mediation Board is given jurisdiction to act, this Court stated exclusive rights were given by the Statute to the bargaining representative. But, in the case of "minor disputes": i. e., those which concern interpretation or application of bargaining agreements, the Court held that the rights conferred by the Statute were given to the employee. Thus, this Court held the employee had the individual right to settle his own grievances for two

[26] The responsibility of the qualified organizations for these supposed consequences and the extent of potential consequences if the participating organizations' interpretation were adopted will be discussed *infra*, under Point IV.

[27] See the dissenting opinion of Justice Frankfurter pp. 759-760.

[28] This Court stated the proposition as follows: "If, moreover, as petitioner urges, this may make the settlement less convenient than if power to deal with grievances were vested exclusively in the collective agent, that consequence may be admitted. But it cannot outweigh the considerations of equal or greater force which we think Congress has taken into account in preserving the individual workman's right to have a voice amounting to more than mere protest in the settlement of claims arising out of his employment" (pp. 740-741).

reasons. First, the language of the Section (Section 2 of the Act) was cast in terms of individual rights. Second, this Court declared that a contrary holding would be against the policy of the Act because, among other things, minorities will be deprived of a voice affecting their very means of livelihood. Thus, this Court stated on pages 733-734:

> "It would be difficult to believe that Congress intended * * * to submerge wholly the individual and minority interests * * *. Acceptance of such a view would require the clearest expression of purpose. For this would mean that Congress had nullified all preexisting rights of workers to act in relation to their employment * * *. Apart from questions of validity, the conclusion that Congress intended such consequences could be accepted only if it were clear that no other construction would achieve the statutory aims."

This Court further expanded on this in footnote 31 of page 734:

> "* * * Accordingly, the interests of unorganized workers and members of minority unions are concerned in the solution. These are not always adverse to the interests of the majority or of the designated union. But they may be so or even hostile * * *. To regard the statute as so completely depriving persons thus situated of voice in affairs affecting their very means of livelihood would raise very serious questions."

The applicability of the *Elgin* case, *supra*, to the present case is apparent. Here, too, we have a "minor dispute" as that phrase is defined in the *Elgin* case, *supra*. The same reasons of the *Elgin* case apply for this Court to declare that in the present case Congress cast the

"national in scope" exception in terms of the employee's right.[29]

The BRT and the *amici curiae* are not helped in their position by the previous decisions involving UROC, including the majority and dissenting opinions in the Court of Appeals in the *Pigott* case, *supra*.[30] All of the previous cases dealing with members of UROC with the possible exception of the District Court opinion in the *Pigott* case, *supra*, have tacitly proceeded on the theory that the employee had the individual right to continue working if the competing organization to which he belonged was indeed "national in scope."

To sum up, on the basis of the plain meaning of the express language of the statute, the decision of this Court in the *Elgin* case, *supra*, and the previously mentioned UROC decisions, Congress granted individual rights to the employee and not collective rights to the bargaining representative, and therefore, Section 3, First (f) is not adequate because it is not available to the employee.

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[29] This Court's distinction between "major" and "minor" disputes in the *Elgin* case, *supra*, also demonstrates that the attempted analogy which the Pennsylvania draws on p. 42 of its brief does not apply. Questions as to propriety of the certification of the bargaining representative are "major disputes" under the Act, which the employee would concededly have no right to challenge. See *Switchmen's Union of North America et al., v. National Mediation Board*, 320 U. S. 297.

[30] Cf. Government brief pp. 6-7. As to the "UROC cases" referred to see, for example, *United Railroad Operating Crafts v. Northern Pacific R. Co.*, 208 F. 2d 135 (CA 9); *Alabaugh v. Baltimore & Ohio R. Co.*, 222 F. 2d 861 (CA 4); *Johns v. Baltimore & Ohio R. Co.*, 118 F. Supp. 317 (N. D. Ill.) aff'd 347 U. S. 964; *Bohnen v. Baltimore & O. C. Term R. Co.*, 125 F. Supp. 463 (N. D. Ind.); *UROC v. Pennsylvania R. Co.*, 212 F. 2d 938 (CA 7).

C.

Section 3, First (f), is not the exclusive manner in which national in scope status can be obtained.

Even assuming for argument only, that Congress vested the right in the union, the contention of no discretion does not apply unless this is an exclusive right and Section 3 is the exclusive way in which it can be determined that a union is "national in scope." The Courts and experts in the field are agreed that Section 3 is not such an exclusive remedy. This Court characterized the Railroad Yardmasters of America as a "national labor organization" despite the fact that it had failed to have a representative on any of the four divisions of the National Railroad Adjustment Board. In *Order of Railway Conductors v. Swan*, 329 U. S. 520, this Court first referred to the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, both of which organizations had representatives on the National Railroad Adjustment Board as "national labor organizations" and stated:

> "But that contention is contradicted by the Railroad Yardmasters of America, *a national labor organization* composed almost entirely of yardmasters and claiming to represent more than 70% of all the yardmasters in the country. That organization, * * * has failed to place a representative on any of the four divisions." (Italics supplied.) (Pp. 522-523.)

Either the petitioning Brotherhood and the *amici curiae* impose a highly artificial and labored construction on the Railway Labor Act, or this Court used extremely loose language in characterizing the Railroad Yardmaster of America as a "national railroad organization" without

it having, at that time, a seat on the National Railroad Adjustment Board. In *UROC v. Pennsylvania R. Co., supra*, the Court of Appeals (7th Cir.) specifically stated that Section 3, First (f) was not the exclusive manner in which "national in scope" status could be obtained. Thus, the Court stated on pages 942-943:

> "It is evident from the provisions of the Act that only those labor organizations which are national in scope may participate in the selection of labor members of the Adjustment Board, though, of course, *an organization could have such status without so participating.*" (Italics supplied.)

This decision was rendered after the District Court opinion in the *Pigott* case, *supra*.

As the petitioning BRT recognizes in the footnote on page 19 of its brief, the various Courts, with the possible exception of the District Court in the *Pigott* case, which have dealt with the "UROC cases" have agreed, that defining "national in scope" was a matter to be determined in the first instance by the National Railroad Adjustment Board or the various System Boards.[31] In other words, these Courts affirmatively held that there was discretion in the System Board to act, as in *Johns v. Baltimore & Ohio R. Co.*, 118 F. Supp. 317 at 321, where the three-Judge court said the dispute was:

> "* * * cognizable by the Board (the National Railroad Adjustment Board), and that should put an end to the jurisdiction of this court until plaintiff has *there sought his remedy*" (parenthetical material and italics supplied).[32]

That decision was affirmed, *per curiam*, by this Court in 347 U. S. 964.

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[31] See footnote 28, *supra*.

[32] As the emphasized language shows, the Court also regarded the rights as belonging to the employee.

A Special Board of Adjustment set up under the provisions of the Union Shop Agreement between the Western Maryland Railroad and the BRT decided that the Railroad Industrial Union "was not a labor organization national in scope."[33] William M. Leiserson, the Referee designated by the National Mediation Board in that case and a well-recognized authority in the field, apparently did not consider that the exclusive method for determining "national in scope" status was Section 3, First (f) of the Act. On the contrary, he decided the case on the merits.

The phrase "national in scope" also appears in the Railroad Retirement Act of 1937, 45 U. S. C., Section 228a(a), and in the Railroad Unemployment Insurance Act, 45 U. S. C., Section 351(a), and is used to determine whether a railway labor organization is an "employer" under the terms of those Acts. Even there, where the exclusive right to qualify obviously belongs only to the railway labor organization, the Railroad Retirement Board has held that Section 153 First (f) is not the exclusive way in which "national in scope" status can be acquired. Thus the Board stated in "*In the Matter of the Status of The American Railway Supervisors Association, Inc., As An Employer Under the Railway Retirement Act and the Railroad Unemployment Insurance Act,*" Docket No. 29, July, 1952 (App. E, pp. 34a-46a):

> "It will be noted that the Regulation (Federal Register, Vol. 4, p. 1480, April 7, 1939 [Sec. 202.15 of Regulations under Railroad Retirement Act of 1937]), recognizing that an organization doing business on or after June 21, 1934 (the enactment date of the Railway Labor Act, as amended), might actually be national in scope and organized in accordance with the provisions of the Railway Labor

[33] Opinion quoted in petitioner Brotherhood's August, 1952, "Circular of Instructions."

> Act without having established a right to participate in the selection of labor members of the National Railroad Adjustment Board * * *" (App. E, p. 42a) (parenthetical material supplied).[34]

Finally, the contention that Section 3 is the sole way in which "national in scope" status may be obtained raises serious constitutional questions. First, the Act is silent on the rules which shall govern proceedings before the Board. This silence has not been cured by the issuance by any competent tribunal of any rules or regulations outlining procedure. Since the three-man Board has never been convened, there is no precedent to guide the applicant or the Board to be formed. In addition, the rules prescribed by one three-man Board would not necessarily be binding on any other three-man Board.

Second, if Congress set up the three-man Board as the sole arbitrator of "national in scope" status, the Act, under the doctrine of *Schechter v. United States*, 295 U. S. 495, and *Carter v. Carter Coal Co.*, 298 U. S. 238, would be invalid in this respect as a delegation of powers to a private, non-governmental body. Lastly, the Act would be unconstitutional on the important ground of violation of due process. This follows because Section 3, First (f) is also within the control of the participating and competing organizations.

As was previously pointed out, Section 3, First (f) is not a two, but a three-step process. Before the Secretary of Labor can inquire into the merits of whether a union is "national in scope" for the limited purpose of selecting members to the Adjustment Board, the participating organizations must certify a dispute exists. It thus becomes obvious that Section 3, First (f) cannot be

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[34] The Association alleged that it had not qualified under Section B First (f) because the existing organizations had "no intention of ever giving * * * a definite answer either one way or the other, as to the recognition * * *."

an adequate remedy for bias at the System Board level, and also, that serious due process deficiencies would arise if this procedure were the exclusive way in which "national in scope" status could be obtained. The decisions rendered by the Secretary of Labor are very significant on these points. In *In the Matter of Brotherhood of Sleeping Car Porters* (App. C, p. 14a) it took the claimant organization over a year of fruitless correspondence and unanswered, repeated requests before the Secretary of Labor interceded on the ground that "the participating organizations seem to have carefully avoided taking a position on this matter" (App. C, p. 18a). In *In the Matter of the American Railway Supervisors' Association, Inc.* (App. D, p. 22a), the claimant organization spent two and a half years trying to get a "dispute" certified by the participating organizations before it was finally granted a hearing by the Secretary of Labor without such certification (App. D, pp. 25a-26a).

Thus, the application of Section 3, First (f) is in the control of the very organizations which have the most to lose if UROC is declared to be "national in scope," and if it must first obtain a seat on the Board. This is the very reason why the lower Court held the decision of the System Board to be invalid. Just how strong this control can be is illustrated by the following factual situation. Assume, that after considerable delay after request, the participating organizations grant the claimant organization a hearing at their next meeting set for some indefinite future time. Assume, that the hearing is finally held with the decision as to whether there is a "dispute" reserved to some future time. That such delaying procedures have taken place is shown by appendix F, pp. 47a-61a, which sets forth an account of what has happened to UROC's attempts to appear before the Secretary of Labor of which respondent asks the Court to take judicial notice.

An administrative remedy which is so greatly within the control of those who will benefit the most from delay, is certainly no adequate remedy for bias. It is also a violation of due process. Therefore, this Court should not agree with the contention that Section 3, First (f) is the exclusive manner in which "national in scope" status can be attained, for then the Act is either unconstitutional in this respect, or judicial review is inevitable.[35]

IV.

"A balance of the equities" shows that the decision of the Court below should be affirmed.

This is an Equity case, and therefore, it is very appropriate for this Court to "balance the conveniences" of the alternative equities. The opposition briefs enlarge supposed consequences of affirmance of the decision of the Court below. First, they contend that the general immunity of the Railway Industry from Court intervention will be invaded and perhaps destroyed. This theory is based upon the "State within a State" argument. See Garrison, The Railroad Adjustment Board: A Unique Administrative Agency (1937), 46 Yale L. J. 567-569. Respondents are not quarreling with the general principle that the Courts should not interfere with Railway Labor disputes because, for certain purposes, Congress has set up a quasi-private government to handle them. But surely even the so-called "Railroad State"

[35] It is highly questionable that a Court could order the participating organizations, the Railway Labor Executives Association, or any other private group to certify a "dispute." The issuance of any extraordinary writ against the Secretary of Labor telling him to find a "dispute" would also be highly questionable since a Court would be substituting its discretion for that of the Secretary where Congress has chosen the Secretary to be the administrative officer in charge of administrating that particular Section of the Act.

is subject to the same due process requirements common to the 48 States, as this Court has held:[36] The BRT's theory that Congress impressed a "trust" on Railway Labor Boards is no answer. This is not a question of integrity of the union men involved; the issue is rather, that they *are men* with human frailities.

Second, they contend that Section 3 is a "speedy, uniform, remedy applied by experts in the field." Even assuming for the sake of argument that obtaining a seat on the Adjustment Board is tantamount to being "national in scope," the alleged remedy is anything but "speedy," as shown by past history, confirmed by the fact that since 1934, the date of passage of the Act, a three-man Board has never been convened. The following is a summary of the apparent time schedule:

1. Application must be made to somebody to have a "dispute" certified.

2. Assuming that the Railway Labor Executives Association agrees it has authority to speak for the participating organizations (the B. L. E., a substantial union, is not a member of the organization) a meeting is indicated for some indefinite time in the future (see App. F, p. 61a; App. E, p. 38a).

3. Assuming that a meeting is held and the question discussed, a decision can be delayed for some time in the indefinite future.

4. After several years if nothing is done, the Secretary of Labor if appealed to, may intervene and say a dispute exists.[37]

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[36] *Steele v. Louisville & R. L. Co.*, 323 U. S. 192; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 325 U. S. 10.

[37] Past decisions of the Secretary, see footnote 11, *supra*. There is no guarantee that a future Secretary of Labor will follow the past decisions of his predecessors on this point.

5. Assume that the Secretary takes the same amount of time to reach a decision as he has in the past, about four to six months, he notifies the National Mediation Board of his decision as to whether the three-man Board should be convened.

6. At this point we finally have a timetable since within ten days after being notified by the Secretary of Labor, the National Mediation Board must appoint a "neutral" and within 30 days after appointment of the "neutral" a decision must be given. As the above shows, whatever else Section 3 is, it is not "speedy." From the very nature of the procedure there is no point where a Court may intervene to speed up the process.

The above time schedule is predicated upon the fact that the "new" union has grown to such a size or scope that there is at least a possibility of its being determined "national in scope." Under the petitioners' interpretation, of course, neither the "new" union nor any one else will know what is required to achieve a "national in scope" status because only the three-man Board can decide this, and a three-man Board has never been convened.[38] Therefore, the "new" union would have to make an educated guess based upon something more than the Secretary of Labor has required in past decisions.[39]

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[38] Indeed, even if a three-man Board had already rendered a decision, there would be no guarantee that a future Board would guide itself by the former decision, without definite criteria being established.

[39] The Secretary of Labor makes his determination on the basis of evidence presented by both the claimant and the participating organizations. See note 7, *supra*. Thus, he is doing more than just inquiring as to whether a prima facie case is presented. While the opposing briefs attempt to equate the language "otherwise properly qualified" used by Congress in referring to the determination of the three-man Board, with "national in scope," for purposes of this case, a "new" union would be taking a grave risk in being guided by the Secretary of Labor's past decisions, if Section 3 is deemed the exclusive manner in which "national in scope" status can be attained. This is true not only in view of the fact that Congress used different language in referring to both findings, but also, under the opposition theory, the three-man Board would be merely duplicating the Secretary's function.

But just how can a "new" union grow to the size where it has at least a possibility of making a successful application when, according to the opposing briefs, one of the chief advantages of an exclusive determination under Section 3 is that an employee will not jeopardize his job by joining an "unqualified" organization. The suggested double-heading; i. e. belonging to the "new" union and to one of the qualified unions, is no workable alternative. See Levinson, *Union Shop Under the Railway Labor Act*, 6 Lab. L. J. 441, 446 (1955).

As pointed out in the Government brief, page 17, the "new" railroad union suffers a disadvantage that does not exist under conventional union shop agreements. When the "new" union is elected bargaining representative it gets only as members those employees who favor it. If, on the other hand, in a subsequent election, it loses by even one vote, all of its members must join the rival brotherhood to retain their jobs. Contrarywise, if the "new" organization retains the contract it must represent all those employees who belong to the rival organizations without receiving any dues contribution from them. Since the largest expenditures involved in the representation of employees is "policing the local contract" it becomes evident that these employees are not paying their fair share of the costs of union administration for benefits that they are receiving at the local level. Thus, the longer the new union, which is "national in scope" in fact, is prevented from having its status so determined, the longer Congressional intent in passing the Union Shop Amendment that each employee pay his fair share of the burden of administration costs is thwarted.[40] The opposing briefs all strive to point out that an organization which has not qualifed under Section 3, First (f) is not

[40] *Railway Employees' Dept. A. F. of L. v. Hanson*, ... U. S. ....., 100 L. ed. (Advance p. 633).

paying its fair share of the burden of administering the Act and therefore, could charge lower dues. The obvious answer, is that the only reason that UROC is not contributing is that the existing organizations have prevented it from so doing (see App. F, pp. 47a-61a). Adding these factors to those discussed above, namely; (a) there is no guide as to what is required of a union to become "national in scope" and (b) the time span for achieving such status is largely within the control of rival organizations, the possibility of a "new" union, contemplated by Congress in the Act, becomes very remote indeed. In other words, what the rival organizations are asking this Court to do is to entrench them so that no new challenge can ever be made to their organizations. Congress certainly did not intend this result when it passed Section 2 Eleventh, the "Union Shop Amendment."[41]

Balance the results of the lower Court's decision with the above. It is true, that at the present posture, Courts must make a determination of "national in scope" status. While it is conceivable that diverse opinions may be reached, the Courts will have the definition of the Secretary of Labor as a certain guide.[42] Thus, spurious litigation by small organizations would be discouraged because there would be no prospect of success. On the other hand, the qualified organizations would not arbitrarily start noncompliance proceedings against the members of the competing new union without carefully ex-

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[41] Section 3 itself contemplates the existence of "new organizations." Thus, Section 3 (a) states: "Said Adjustment Board shall consist of 36 members, 18 of whom shall be selected by the carrier and 18 by such labor organizations of the employees national in scope, as have been or *may be* organized in accordance with the provisions of Section 2 of this Act." (Italics supplied.)

[42] This Court has stated that an interpretation by the official entrusted with the administration and enforcement of the Section of the Statute "are entitled to great weight." *United States v. American Trucking Association*, 310 U. S. 549 (1940); *Kern River Co. v. United States*, 257 U. S. 147; *Billings v. Truesdell*, 321 U. S. 542.

amining its status. In addition, while under the opposing construction, there would be no guide as to the meaning of "national in scope" until the three-man Board acted, if it ever is convened, a ruling by this Court that Congress intended to adopt the Secretary of Labor's definition, would make for immediate certainty in a field where certainty is essential."[43] Such a ruling would give full meaning to all of the language used in the Act, including the phrase "otherwise properly qualified." This will agree with the opposing briefs which point out that the Act should be read as a whole and with the Government brief which urges that the "expanded language" of Section 152 Eleventh (the Union Shop Amendment) should be given full effect. Finally, as the B. L. E. points out on page 26 of its brief, in *Kepner v. United States,* 195 U. S. 100, 124, this Court said:

> "It is a well settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body."

The "settled and well-known meaning" was the definition given by the Secretary of Labor and that Congress intended to incorporate that definition into the Statute is confirmed by the "expanded language" used in the Statute.

In "balancing the conveniences" it should be pointed out that all of the opposing briefs make one common error. They all assume that the only alternative to holding Section 3 to be either an adequate or exclusive

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[43] Just how much diversion there can be among "experts" in the definition of the phrase is shown by the definition put forth by one of the *amici curiae*, the B. L. E., in *In the Matter of the American Railway Supervisors Association, Inc.*, p. 10 of the Secretary's opinion, *supra*. As the Secretary pointed out, many of the qualified organizations themselves would not be "national in scope" under the definition the B. L. E. advanced.

remedy, is Court intervention. As the Court below pointed out this is not so. Had the Railway Labor organizations and the carriers provided a fair, prompt and impartial tribunal under the Act, as they could have done, this case would not be in this court now."[44] Thus, a vital reason for the Court review is the failure of the very organizations who oppose it, to set up a fair method under the Act.

Finally, it is argued, that "national in scope" is a term of art applied to the Railway Industry, and therefore, its meaning should be determined by "experts" who are familiar with its connotations. In *NLRB v. Highland Park Mfg. Co., supra,* this Court held that the term "national or international organization" was used in its generally accepted meaning, and not as a term of art, despite a contrary ruling by the National Labor Relations Board. Mr. Justice Frankfurter dissented on the ground that the:

> "best source * * * in determining whether a term used in the field of industrial relations has a technical connotation is the body to which Congress has committed the administration of the statute" (p. 327).

[44] Judge Hand stated this as follows: "If it be argued that the result of our decision is inevitably to interject the courts into the enforcement of the right granted by Section 152, Eleventh (a), we answer that that is not necessarily true. Section 153, Second, provides that if * * * either party to an 'arrangement' setting up a 'System Board' is dissatisfied, it may 'elect to come under the jurisdiction of the Adjustment Board.' Whether this implies that, if 'dissatisfied' the parties must altogether abandon a 'System Board' 'arrangement,' after they have set it up; or whether it allows them to limit the scope of its jurisdiction, we need not say. If it means the second, it will be possible in the agreement setting up a 'System Board' to refer disputes such as that at bar to a panel set up under the National Adjustment Act, which can presumably be made impartial." (Record 43-44.) For example, an impartial tribunal could have been and still could be set up under the N. R. A. B. and the Union Shop Agreements could be written so that this tribunal would have jurisdiction to settle Union Shop disputes.

Here, Congress has committed the administration of the Section to the Secretary of Labor, and he has defined the phrase "national in scope" not as a term of art, but as being used in its commonly accepted meaning. Therefore, in the views of both the majority and minority of this Court in the *Highland* case, *supra*, it is the commonly accepted meaning of the words "national in scope" and not some expert opinion that is controlling.[45]

CONCLUSION.

The instant case goes into the basic philosophy of the judicial function in the review of administrative board determinations. Over the last two decades, Congress has created many administrative bodies to deal with intricate problems in many specialized fields of law. The Federal Courts, led by decisions of this Court, have ceded large areas of their jurisdiction to these administrative bodies on the theory that these boards, as experts in the field, are better able to deal with the complex problem arising in these fields. No area of law better illustrates this than the railway labor field. But, together with the many salutory results of this development has come in some instances a disregard of the fundamental rights of the individual caused by an entrenchment of the "powers that be." Thus, the really fundamental issue in the present case is at what point will a Court intervene, in a field where it normally will not, to protect these fundamental individual rights from abuse.

Section 3, First (f) is no remedy for the employee. He has no access to it. The opposing briefs attempt to in-

[45] There has been no agreement between "experts" as to what the term means. See footnote 39, *supra*.

corporate its technical provisions into Section 2, Eleventh (the Union Shop Amendment) without the slightest showing from Congressional debate or the Act itself that such an interpretation reflects Congressional intent and despite the fact that while Congress specifically referred to Section 3, First (h) in the "Union Shop Amendment" it made no mention of Section 3, First (f). Their argument that it is the exclusive remedy runs counter to the great weight of authority in the field and raises serious constitutional objections.

The justification advanced for the "judicial legislation" requested of this Court[46] is the so-called "adverse" results of the decision of the Court below. What the petitioners are in effect arguing in the first sections of their briefs is that Congress gave the system Board a "right" to be immune from judicial review. But, if this "right" exists, it is a qualified right which exists so long as the "rights" of others are not invaded.

The reasons of policy in the opposition briefs can all be translated into the terms of a single right, the "right to certainty." Thus, it is argued that only if Section 3, First (f) is deemed the exclusive manner in which "national in scope" status can be obtained, will carrier, qualified union, competing union and employee know what the term means and be protected.

The only certainty the employee will have under this interpretation is the certainty of having no choice. To hold his job he must belong to the qualified organization or double-head for an indefinite length of time in the hope that the union he desires to represent him either qualifies under a procedure, access to which the qualified organizations control, or wins the contract. In the latter event,

[46] See Judge Allen's dissenting opinion in the *Pigott* case, *supra*, pp. 26 and 27.

of course, if his union loses at the next election by a single vote he must rejoin the very union which he rejected. He, himself, has so little control over his own affairs that he cannot make any independent appraisal as to whether an "unqualified" union is "national in scope" because he has nothing to guide him since a three-man Board has never been convened for any purpose.

This right of certainty does not extend to a "new" union either. Even assuming it can get members in light of the last paragraph, it has no guide as to when it has reached sufficient scope or size to qualify as "national in scope" before a prospective three-man Board completely unfettered by any procedural or substantive standards.

Thus, the carrier and the qualified unions are unwilling to extend to the employee or to the "new" union the "right of certainty" which they desire for themselves. Contrasted with this, Court review on the basis of the Secretary of Labor's decisions gives immediate certainty to all. The employee and the "new" union definitely know what is required. Likewise, the carrier and the standard union are protected without the "standard union" being entrenched. Even this limited Court review can be avoided by carrier and "standard union" if a truly fair and impartial administrative procedure is set up under the Act.

Perhaps the most important result from the unanimous decision of the Court below is that the so-called "standard unions," faced with the prospect of a fair and impartial determination of a new and competing union's status will remain responsive to the wishes of their

membership and to the ever changing needs of a shrinking railway industry.

Respondents respectfully request that the Court affirm the decision of the Court below.

Respectfully submitted,

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